

JAMES B. COMEY
United States Attorney for the
Southern District of New York
By: DAVID J. KENNEDY (DK-8307)
Assistant United States Attorney
33 Whitehall Street -- 8th Floor
New York, New York 10004
Tel. No.: (718) 422-5649
Fax No.: (718) 422-1789

HEARING DATE: February 27, 2003, at 10 AM

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

In re:

CHAPTER 11

CEDAR CHEMICAL CORPORATION, and
VICKSBURG CHEMICAL COMPANY,

Case No. 02-11039 (SMB)
Case No. 02-11040 (SMB)

Debtors.

-----X

**OBJECTION OF THE UNITED STATES OF AMERICA
TO MOTION BY THE DEBTORS FOR AN ORDER PURSUANT TO 11 U.S.C. § 105
DETERMINING THAT RICECO IS NOT LIABLE FOR ENVIRONMENTAL
CLEANUP, AND PURSUANT TO 11 U.S.C. § 105,
APPLYING AND ENFORCING THE AUTOMATIC STAY**

1. The United States, on behalf of the Environmental Protection Agency (“EPA”), by its attorney James B. Comey, United States Attorney for the Southern District of New York (the “Government”), respectfully objects to the Motion by the Debtors for an Order pursuant to 11 U.S.C. § 105 determining that RiceCo, a non-debtor (“RiceCo”) is not liable for environmental cleanup, and pursuant to 11 U.S.C. § 105, applying and enforcing the automatic stay (the “RiceCo Absolution Motion”).

2. The Government objects to the RiceCo Absolution Motion because Debtors cannot obtain declaratory relief, in bankruptcy court, as to the environmental liabilities of a non-debtor.

Even if the Court had jurisdiction over this matter, moreover, Debtors' suggestion that an entity's liability under state and federal environmental laws should be determined on the basis of a self-serving, unsworn, three-page letter is absurd. The Court should not only deny the RiceCo Absolution Motion, but should also require, as a condition of any sale of Debtors' interest in RiceCo, that the provisions of the Purchase Agreement that purport to release RiceCo of any potential liability should be stricken.¹

BACKGROUND

A. The Parties

3. On March 8, 2002, the Debtors commenced these Chapter 11 cases by filing voluntary petitions for relief under 11 U.S.C. § 101 et seq. (the "Code").

4. The Debtors continue to manage their properties and to operate their business as debtors-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

5. This Objection is respectfully submitted on behalf of the Environmental Protection Agency ("EPA"), an agency of the United States.

B. The RiceCo Absolution Motion

6. On February 7, 2003, Debtors filed this motion seeking an order, pursuant to § 105 of the Code, declaring that RiceCo is not liable for environmental cleanup, and applying the automatic stay to prevent the Arkansas Department of Environmental Quality ("ADEQ") from taking any action against RiceCo with respect to its liability for cleanup of the Cedar Site. RiceCo

¹ The Government has previously raised these arguments in its response to Debtors' motion authorizing the Debtor to sell certain assets free and clear of liens and claims to Westrade USA, Inc., and for related relief (the "Westrade Motion"). A hearing on that Motion was originally scheduled for February 18, 2003, but because of weather conditions was rescheduled to February 25, 2003.

is not a debtor in bankruptcy. Debtors alleged that they had received a letter from ADEQ on or about November 20, 2002, notifying RiceCo that it was a potentially responsible party (“PRP”) under Arkansas Code § 8-7-512 (the “ADEQ Letter”). (RiceCo Absolution Motion ¶ 8.)

7. Debtors further allege that as a result of the ADEQ Letter, there is a “chilling effect” on Debtors’ efforts to sell their interest in RiceCo (id.), and that the prospective buyer “is threatening to walk away if the ADEQ’s claim against RiceCo is not resolved immediately.” (Id. ¶ 10.) Debtors allege, however, that they were “unable at this time to disclose either the identity of the prospective buyer or the exact purchase price.” (Id. ¶ 6.)

8. Although the RiceCo Absolution Motion specifically concerns a possible claim by ADEQ that RiceCo is a potentially responsible party under state law, Debtors maintain that the standard of liability under Arkansas environmental law is the same as the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq. (“CERCLA”) (RiceCo Absolution Motion ¶ 8.) The EPA has not taken any position with respect to RiceCo’s potential liability under CERCLA or any other statute, but objects to any effort by Debtors to obtain declaratory relief as to the environmental liability of a non-debtor as against the United States or any of its agencies, including the EPA. Significantly, in describing the scope of Ark. Code § 8-7-512, Debtors explicitly compare this provision to CERCLA. (RiceCo Absolution Motion ¶ 8 (“Like its federal counterpart (CERCLA), clean-up liability under Arkansas environmental law is retroactive, strict, joint, and several.”).)

9. Debtors contend that first, they are entitled to an order “determining” that RiceCo is not liable for environmental cleanup (RiceCo Absolution Motion ¶ 11), and second, an order applying and enforcing the automatic stay against ADEQ.

C. The Westrade Motion

10. On February 10, 2003, the next business day after filing a motion stating that it was “unable” to disclose the identity of the prospective buyer or the purchase price (RiceCo Absolution Motion ¶ 6), Debtors filed the Westrade Motion, which discloses that the prospective buyer is Westrade and that the purchase price is \$5.5 million.²

11. The Westrade Motion includes a copy of the Purchase Agreement, which provides:

Purchaser’s obligation to close under this Agreement is conditioned upon either (i) the Bankruptcy Court entering a final order finding that RiceCo is not a potentially responsible party (a “PRP”) in connection with environmental claims by the Arkansas Department of Environmental Quality (“ADEQ”) relating [to] the Seller or Seller’s property, or (ii) the ADEQ’s release of, and agreement not to pursue, its claim that RiceCo is a PRP.

(Westrade Motion Exh. B, ¶ 5(d).)

12. In its Objection to the Westrade Motion filed on February 14, 2003, the Government noted that to the extent that the Westrade Motion purported to provide for a sale in which any potential environmental liability to the United States of RiceCo, a non-debtor, would be extinguished, the Westrade Motion should be denied. Moreover, the Government argued that to ensure that the Debtors do not use the sale of RiceCo to Westrade as a vehicle for eliminating RiceCo’s potential environmental liability, as the Purchase Agreement purports to do, any sale must be delayed until the resolution of the RiceCo Absolution Motion, including time to resolve any appeal in connection with the Motion.

² As the Government has previously noted, Debtors do not provide an explanation as to why the information deemed confidential on Friday, February 7, 2003, was no longer confidential on Monday, February 10, 2003, particularly where the Purchase Agreement itself was signed on February 5, 2003, before either Motion was made.

ARGUMENT

POINT I

THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THE MOTION

A. The RiceCo Absolution Motion Does Not Present a Ripe Controversy

13. The RiceCo Absolution Motion asks the Court to rule upon a purely hypothetical question, and therefore does not present a “case or controversy” amenable to judicial resolution. For a federal court to assert jurisdiction over an action, the Court must find that a justiciable “case or controversy” exists. To satisfy the requirements of Article III, a plaintiff “must allege some threatened or actual injury.” Such injury must be “sufficiently real and immediate,” as opposed to merely “conjectural or hypothetical.” Alliance of American Insurers v. Cuomo, 854 F.2d 591, 595-96 (2d Cir. 1988) (citations omitted). The controversy must be “real and substantial . . . , admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 241, reh’g denied, 300 U.S. 687 (1937). No Article III case or controversy exists in “cases which present a hypothetical conflict which, while perhaps foreseeable, has not yet become imminent.” Guttmacher Institute v. McPherson, 616 F. Supp. 195, 199 (S.D.N.Y. 1985), modified in part, aff’d in part, 805 F.2d 1088 (2d Cir. 1986).

14. The Second Circuit has squarely ruled that the receipt of a letter from an environmental authority advising a party that it may be a PRP does not present a “case or controversy” suited for judicial resolution. See Carter Day Indus., Inc. v. U.S. Environmental Protection Agency (In re Carter Day Indus.), 838 F.2d 35 (2d Cir. 1988). As the Second Circuit noted, “[t]he PRP letter is not a final, definitive ruling with the status of a law demanding immediate compliance since it does not impose any liability upon” the debtor. Id. at 38. The dispute over the

assertion of PRP liability was therefore not ripe for adjudication. See id.; see also In re Bradlees, 95 Civ. 5494 (JSM), 1995 WL 510005, at *1 (S.D.N.Y. Aug. 28, 1995) (ruling that even where Government’s objection to release from environmental liability “places in jeopardy the ability of the Debtors to reorganize,” that “[t]he Government is correct, however, in arguing that the question of Chemical[’]s possible liability under CERCLA is at this point too theoretical to warrant a declaratory judgment”) (citing Carter Day). Similarly, in In re 335 Broadway/93 Worth Company, 95-B-41425 (SMB) (Bankr. S.D.N.Y. April 21, 1995), this Court rejected a provision in a post-petition financing agreement purporting to release the non-debtor lender from potential “owner or operator” liability, noting that, “I don’t see how I could adjudicate a hypothetical dispute like that.” (A true and accurate copy of selected pages of the transcript of the hearing is annexed hereto as Exhibit A.)

15. The Second Circuit in Carter Day also noted that requiring the environmental authorities to litigate liability simply because a PRP letter has been issued would impose significant burdens upon the Government: “If the EPA is forced to expend its resources on preserving its rights to eventual recovery against any PRP that has recently emerged from bankruptcy, the EPA will have less ability to pursue its primary mission of cleaning the sites.” Id. at 40. Where enforcement actions were more advanced, the controversy could be deemed ripe. See, e.g., Manville Corp. v. United States, 139 B.R. 97, 107 (S.D.N.Y. 1992) (noting that controversy was ripe because environmental authorities had “threatened” debtor with enforcement measures or “initiated coercive settlement processes”). In this case, however, the potential dispute between ADEQ and RiceCo has progressed exactly as far as in Carter Day: ADEQ sent a PRP letter and RiceCo responded. Compare Carter Day, 838 F.2d at 38. The RiceCo Absolution Motion, therefore, does not present an issue ripe for adjudication even as to ADEQ.

16. Even if the Court were to conclude that any actions by ADEQ amounted to threatened enforcement or coercive settlement processes (which it should not), there is no indication that EPA or any other federal agency has taken any action against RiceCo, including sending a PRP letter, under CERCLA or any other federal environmental statute. Accordingly, any order granting the RiceCo Absolution Motion should be strictly limited to ADEQ, and explicitly exclude EPA and any liability under any federal environmental, or other, statute from its scope.

B. The Court Has No Jurisdiction Over the RiceCo Absolution Motion Because RiceCo Is Not a Debtor

17. The RiceCo Absolution Motion is also meritless because RiceCo is not a debtor. The Code confers no authority upon the bankruptcy court to discharge non-debtors. Section 524(e) of the Code provides that the “discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.” 11 U.S.C. § 524(e). Here, the RiceCo Absolution Motion itself alleges that, “RiceCo is a distinct entity from Cedar.” (RiceCo Absolution Motion ¶ 12.) Consequently, any relief would be barred by § 524(e).

18. There is currently a circuit split over whether it is ever proper to enjoin collection efforts against third parties. Compare In re Lowenschuss, 67 F.3d 1394, 1401 (9th Cir. 1995) (“This court has repeatedly held, without exception, that § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors.”), with SEC v. Drexel Burnham Lambert, 960 F.2d 285, 293 (2d Cir. 1992) (permitting injunctive relief in limited circumstances). Those cases permitting such relief do so only where “the injunction plays an important part in the debtor's reorganization plan.” Drexel Burnham, 960 F.2d at 293. In this case, by contrast, “Cedar is no longer operating,” (Westrade Motion ¶ 8) and there will be no plan of reorganization, and consequently no justification for such relief. See, e.g., In re Granite Partners, L.P., 194 B.R. 318, 338 (Bankr. S.D.N.Y. 1996)

(rejecting debtors’ suggestion that the automatic stay precluded a suit to recover insurance proceeds because “there are substantial differences . . . which militate against injunctive relief. Granite does not operate, and the trustee is liquidating their assets.”).

19. Thus even if the Court were inclined to explore the possibility of releasing non-debtors, Debtors’ own papers demonstrate that such a release would be improper here. In a recent survey of the law on this point, the Sixth Circuit noted that non-debtor releases may be permissible only under the following “unusual circumstances”:

(1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

In re Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002). The RiceCo Absolution Motion argues at length that RiceCo is a separate entity and that Debtors and RiceCo do not share officers or directors. (RiceCo Absolution Motion ¶¶ 9, 12.) Consequently, a suit against RiceCo cannot be deemed to be a suit against the Debtors (condition no. 1). Debtors have also failed to demonstrate that successful liquidation “hinges on” absolving RiceCo of any potential liability, or that such absolution is “essential to” this case (conditions nos. 2 and 3). To the contrary, this interest is simply “the last remaining significant asset to be liquidated.” (Westrade Motion ¶ 31.) Further, the EPA plainly does not consent to such a release, nor has there been any suggestion that CERCLA claims will be paid, such that conditions nos. 4, 5, and 6 cannot be met. Finally, Debtors’ effort to

litigate CERCLA liability on the basis of a three-page letter precludes the Court from making sufficient and specific factual findings to support such a release (condition 7). For all of these reasons, the RiceCo Absolution Motion should be denied.

C. The Court Has No Jurisdiction Over the RiceCo Absolution Motion Because CERCLA Precludes Preenforcement Judicial Review

20. The third reason the Court lacks jurisdiction over the RiceCo Absolution Motion is that the plain language of CERCLA prevents the Court, whether a federal district court or a bankruptcy court, from engaging in preenforcement judicial review. Section 104 of CERCLA, 42 U.S.C. § 9604, authorizes EPA to take “response actions” whenever there is a release or threatened release of a “hazardous substance.”³ EPA undertakes response actions unless it determines that such actions will be properly performed by a “responsible party,” as defined in Section 104(a) of CERCLA, 42 U.S.C. § 9604(a). See also Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). In each case, EPA decides whether (a) to spend funds from the Hazardous Substances Superfund (the “Fund”), which is currently authorized pursuant to Section 517 of the Internal Revenue Code, 26 U.S.C. § 9507; (b) to study and take appropriate corrective measures at a site; (c) to compel responsible parties to undertake a response action; or (d) to allow PRPs who offer to conduct a response action to do so.

21. CERCLA encourages EPA to offer PRPs the opportunity to implement or fund the remedy. See, e.g., 42 U.S.C. § 9604(a). Accordingly, Section 122(e) of CERCLA, 42 U.S.C. § 9622(e), provides that when EPA determines that a “period of negotiation . . . would facilitate an

³ CERCLA defines “hazardous substance” to include substances listed under a variety of other federal environmental statutes such as “hazardous wastes” under the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6927, and “hazardous substances” listed by EPA under Section 311 of the Clean Water Act, 33 U.S.C. § 1321. See Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); 40 C.F.R. § 302.4.

agreement with potentially responsible parties for taking response action . . . and would expedite remedial action,” it shall notify all PRPs and provide them with certain information to facilitate those negotiations. 42 U.S.C. § 9622(e)(1). If EPA does not reach an agreement with PRPs to perform the appropriate response actions, it may either perform such actions itself or order PRPs to perform them. EPA-performed response actions are initially financed through the Fund, and then may be recovered from “responsible parties” through the reimbursement procedure set out in Section 107 of CERCLA, 42 U.S.C. § 9607. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), establishes a reimbursement scheme for assessing the costs of EPA response activities against the persons or entities ultimately determined to be “responsible.” It is this potential liability of RiceCo that Debtors seek to eliminate.

22. The Debtors essentially request that this Court summarily issue a declaratory judgment that a non-debtor does not have environmental cleanup liabilities. Pursuant to 42 U.S.C. § 9613(h), however, the federal courts have no power to review any EPA preenforcement decision. CERCLA’s complex procedures are designed to give EPA the authority to undertake cleanup actions before becoming embroiled in litigation to resolve liability for the cost of cleanup. See S. Rep. 848, 96th Cong., 2d Sess. 8, 11-12, 22, 56, 62 (1980). Indeed, the Carter Day Court concluded that it was imperative to permit CERCLA’s prelitigation procedures to play themselves out before judicial intervention would be appropriate. See Carter Day, 838 F.2d at 37, 39-40.

23. In sum, this Court cannot circumvent the comprehensive statutory procedures summarized above and issue a declaration releasing the non-debtors from unspecified environmental liability. See 42 U.S.C. § 9613(h); Carter Day, 838 F.2d at 37 (citing § 9613(h)). Even if this case presented a ripe controversy concerning a debtor, as opposed to a speculative controversy involving a non-debtor, the plain terms of CERCLA impose a separate jurisdictional bar to the RiceCo

Absolution Motion.

D. Even If the RiceCo Absolution Motion Presented a Live Controversy Involving a Debtor, Resolution of RiceCo's Environmental Liability Requires an Adversary Proceeding

24. Even putting aside the insuperable jurisdictional barriers to the relief Debtors seek, the RiceCo Absolution Motion should be denied because it asks the Court to issue declaratory relief, which can only be obtained in bankruptcy court by adversary proceeding. The Debtors' claim that they are seeking a ruling "determining," rather than "declaring," RiceCo's liability does not change this outcome. (RiceCo Absolution Motion ¶ 11.) As Debtors are seeking declaratory relief, Federal Rule of Bankruptcy Procedure 7001(9) requires an adversary proceeding. Because Debtors have not filed an adversary proceeding, but seek relief solely by motion, the motion should be denied.

25. Debtors' suggestion that a non-debtor's liability can be determined solely on the basis of two brief letters – a preliminary letter from ADEQ and RiceCo's three-page response – is absurd. A determination of CERCLA liability typically involves time-consuming and exhaustive administrative proceedings, a complaint, an answer, document discovery, depositions, motion practice, potentially a trial, and even an appeal. Debtors cannot abbreviate this process and obtain a judicial declaration that RiceCo has no environmental liabilities based solely on preliminary correspondence. It is precisely the incongruity of determining potentially multimillion dollar liability on so flimsy a record that proves that the question of RiceCo's environmental liability is not ripe for adjudication, see Carter Day, 838 F.2d at 38, and that any such declaratory determination must be obtained by adversary proceeding, which would permit resolution of the issue on a much fuller record, see Fed. R. Bankr. P. 7001(9).

26. There are also numerous factual issues left unresolved by RiceCo's letter. Debtors admit that Westrade at one time owned an interest to RiceCo, rendering it unclear whether the

ADEQ Letter truly had the “chilling effect” attributed to it by Debtors. (Westrade Motion ¶ 43.)⁴ For all of these reasons, even if the RiceCo Absolution Motion were not jurisdictionally barred, it is procedurally inappropriate, precipitous, and meritless.

POINT II

THE PLAIN LANGUAGE OF THE CODE EXEMPTS POLICE AND REGULATORY AUTHORITIES FROM THE AUTOMATIC STAY

27. Debtors’ argument that the ADEQ Letter somehow violated the automatic stay is frivolous. Section 362(b)(4) of the Code specifies that the automatic stay which generally precludes “the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor” does not apply to “the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit’s . . . police and regulatory power . . . other than [the enforcement of] a money judgment.” 11 U.S.C. § 362(a), 362(b)(4). Enforcement of environmental laws enacted to protect public health and safety is a classic exercise of police and regulatory authority. Indeed, “[n]o more obvious exercise of the State’s power to protect the health, safety, and welfare of the public can be imagined.” Penn Terra Ltd. v. Department of Environmental Resources, Commonwealth of Pennsylvania, 733 F.2d 267, 274 (3d Cir. 1984). Not only was the ADEQ Letter sent to a non-debtor, but the Second Circuit has squarely ruled that actions to enforce environmental laws fall within the police or regulatory power exception to the automatic stay. See City of New York v. Exxon Corp., 932 F.2d 1020, 1024-25 (2d Cir. 1991) (“We therefore hold that governmental actions under CERCLA to recover costs expended in response to completed

⁴ The Government has previously noted that, the next business day after filing the RiceCo Absolution Motion, Debtors filed papers seeking to establish procedures for a sale, and stating that Westrade was a “stalking horse” who had “thoroughly reviewed and negotiated this transaction” (Westrade Motion ¶ 18), thus suggesting that the alleged “chilling effect” was indeed derived from “imagination.” (RiceCo Absolution Motion ¶ 8.)

environmental violations are not stayed by the violator's filing for bankruptcy."'). As the Third Circuit has explained:

Congress recognized . . . that the stay provision was particularly vulnerable to abuse by debtors improperly seeking refuge under the stay in an effort to frustrate necessary governmental functions. To combat the risk that the bankruptcy court would become a sanctuary for environmental wrongdoers, among others, Congress enacted the police and regulatory exception to the automatic stay

. . . . These provisions embody Congress' recognition that enforcement of the environmental protection laws merits a higher priority than the debtor's rights to a "cease fire" or the creditors' rights to an orderly administration of the estate.

United States v. Nicolet, Inc., 857 F.2d 202, 207 (3d Cir. 1988) (emphasis added) (citations omitted).

28. The legislative history of the Bankruptcy Reform Act of 1978, which enacted the police and regulatory exception, confirms:

Under present law, there has been some overuse of the stay in the area of governmental regulation. For example, in one Texas bankruptcy court, the stay was applied to prevent the State of Maine from closing down one of the debtor's plants that was polluting a Maine river in violation of Maine's environmental protection laws The bill excepts these kinds of actions from the automatic stay. The States will be able to enforce their police and regulatory powers free from the automatic stay.

H.R. Rep. No. 95-595, at 174-75 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6135. See Midlantic National Bank v. New Jersey Department of Environmental Preservation, 474 U.S. 494, 504 n.6 (1986); In re Commonwealth Oil, 805 F.2d 1175, 1182-1184 & n.7 (5th Cir. 1986). Another passage in both the House and Senate Reports noted that:

Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws . . . the action or proceeding is not stayed under the automatic stay.

H. R. Rep. No. 95-595, at 343 (emphasis added), reprinted in 1978 U.S.C.C.A.N. 5963, 6299; S.

Rep. No. 95-989, at 52 (1977) (emphasis added), reprinted in 1978 U.S.C.C.A.N. 5787, 5838; see Midlantic, 474 U.S. at 503-04; In re Commerce Oil, 847 F.2d 291, 295 (6th Cir. 1988); Commonwealth Oil, 805 F.2d at 1182-83. As the caselaw and legislative history demonstrate, Debtors' accusation that the ADEQ Letter violated the automatic stay is meritless.

POINT III

SECTION 105 CANNOT SUPPORT THE RELIEF REQUESTED

29. Debtors cannot resuscitate their meritless claims by contending that 11 U.S.C. § 105 empowers the Court either to determine RiceCo's liability or expand the automatic stay. The Bankruptcy Court may not use its equitable authority to authorize noncompliance with police and regulatory requirements. See Unsecured Creditors' Committee of Highland Superstores, Inc. v. Strobeck Real Estate, Inc. (In re Highland Superstores, Inc.), 154 F.3d 573, 578-79 (6th Cir. 1998) (bankruptcy courts "do not have free rein to ignore a statute in the exercise of their equitable powers"); Southmark Corp. v. Grosz (In re Southmark Corp.), 49 F.3d 1111, 1116 (5th Cir. 1995) ("the bankruptcy court exceeded the limits of equitable powers under § 105(a) by creating substantive rights that otherwise would not have existed"; Section 105 does not authorize the bankruptcy courts "to act as roving commission[s] to do equity"); In re Fesco Plastics Corp., 996 F.2d 152, 154, 156-57 (7th Cir. 1993) ("when a specific Code section addresses an issue, a court may not employ its equitable powers to achieve a result not contemplated by the Code"); In re Charles & Lillian Brown's Hotel, 93 B.R. 49, 54 (Bankr. S.D.N.Y. 1988) ("Code § 105(a) does not create substantive rights otherwise unavailable or grant the bankruptcy court an 'unrestricted license to do equity.'").

30. Debtors cannot, therefore, employ § 105 to override the "case or controversy" requirement of Article III, § 524's prohibition on the discharge of non-debtors, CERCLA's

prohibitions on preenforcement review, the Federal Rules of Bankruptcy Procedure, and § 362(b)(4)'s exception for police and regulatory power. Debtors' reliance on § 105 cannot compensate for the enormous deficiencies in their application.

CONCLUSION

For the reasons stated above, the RiceCo Absolution Motion should be denied in its entirety (or, in the alternative, denied as against EPA and any other federal agency). If the Court does not deny the RiceCo Motion, any such denial should be stayed, or conditioned upon delay of the sale of Debtors' interest in RiceCo, until the Government's time to appeal has lapsed, or until such time as any appeal from this Court's rulings becomes final.

Dated: New York, New York
February 24, 2003

JAMES B. COMEY
United States Attorney for the
Southern District of New York
Attorney for the United States of America

By: \s\ David J. Kennedy
DAVID J. KENNEDY (DK-8307)
Assistant United States Attorney
33 Whitehall Street, 8th floor
New York, New York 10004
Tel. (718) 422-5649
Fax (718) 422-1789